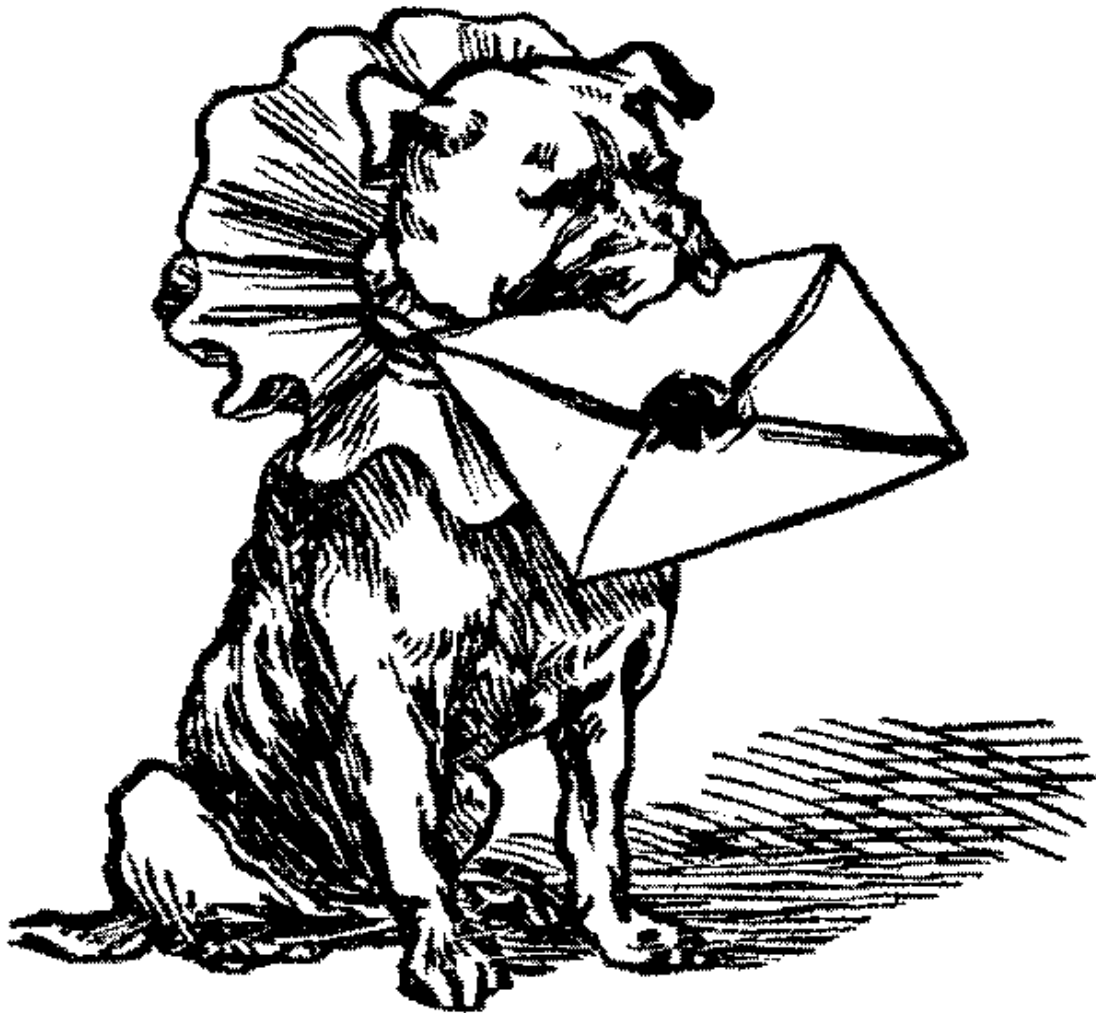


Chapter 7

Sealed Bidding



2014 Contract Attorneys Deskbook

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CHAPTER 7

SEALED BIDDING

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CHAPTER 7

SEALED BIDDING

I. INTRODUCTION

The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis.

United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940).

II. THREE CONTRACT METHODS

- A. Sealed Bidding. FAR Part 14.
- B. Contracting by Negotiation. FAR Part 15.
- C. Simplified Acquisition Procedures. FAR Part 13.

III. FRAMEWORK OF THE SEALED BIDDING PROCESS

- A. Overview:
 - 1. Sealed bidding is the oldest method of contracting in the United States. For many years, it was the contracting method of choice. Today, it is the least used method but it remains foundational to an adequate understanding of government contract law in the United States. For an excellent history of sealed bidding in government contracting, see “A History of Government Contracting” by James F. Nagle. See also 2 Stat. 536; 6 Ops. Atty. Gen. 99, 1853 WL 2170; 2 Ops. Atty. Gen. 257, 1829 WL 449.
 - 2. Sealed bidding is a method of contracting where contracts are awarded to:
 - a. The LOWEST PRICED
 - b. RESPONSIVE BID
 - c. Submitted by a RESPONSIBLE BIDDER. FAR 14.103-1(d).

3. Contract Types: Bids must be firm fixed price (FFP) or firm fixed price with economic price adjustment (FFP w/EPA). FAR 14.104.
- B. Current Statutes
1. DoD, Coast Guard, and NASA – 10 U.S.C. §§ 2302 *et al.*
 2. Other federal agencies – 41 U.S.C. §§ 3301 *et al.*
- C. Current Regulations
1. FAR Part 14 – Sealed Bidding.
 2. DoD and agency regulations:
 - a. Defense FAR Supplement (DFARS), Part 214 – Sealed Bidding.
 - b. Air Force FAR Supplement (AFFARS), Part 5314 – Sealed Bidding.
 - c. Army FAR Supplement (AFARS), Part 5114 – Sealed Bidding
 - d. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), Part 5214 – Sealed Bidding.
 - e. Defense Logistics Acquisition Directive (DLAD), DLAD Part 14 – Sealed Bidding.
- D. Mandatory Use of Sealed Bidding
1. Agencies are **required** to use sealed bidding where all elements enumerated in these parallel statutory structures for the use of sealed bidding procedures are present. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3301(b)(1); FAR 6.401(a); FAR 14.103-1; see Racal Filter Technologies, Inc., B-240579, 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990) (sealed bidding required when all elements enumerated in the Competition in Contracting Act (CICA) are present—agencies may not use negotiated procedures); see also UBX Int’l, Inc., B-241028, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991) (use of sealed bidding procedures for ordnance site survey was proper)
 2. **The Racal Factors** – The head of an agency **shall** solicit sealed bids if—
 - a. Time permits the solicitation, submission, and evaluation of sealed bids;

- a. The award will be made on the basis of price and other price-related factors [see FAR 14.201-8];
 - b. It is not necessary to conduct discussions with the responding sources about their bids; and
 - c. There is a reasonable expectation of receiving more than one sealed bid.
3. Negotiated procedures are only authorized if sealed bids are not appropriate under FAR 6.401(a). FAR 6.401(b)(1); see Racal Filter Technologies, Inc., B-240579, , 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990); see also UBX Int'l, Inc., B-241028, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991),.
4. The determination as to whether circumstances support the use of negotiated procedures is largely a discretionary matter within the purview of the contracting officer.
 - a. While the decision to employ negotiated procedures involves the exercise of a business judgment, such decisions must still be reasonable. Essex Electro Eng'rs, Inc., B-221114, 86-1 CPD ¶ 92 (Comp. Gen. Jan. 27, 1986). An agency must reasonably conclude that the conditions requiring use of sealed bidding are not present. F&H Mfg. Corp., B-244997, 91-2 CPD ¶ 520 (Comp. Gen. Dec. 6, 1991).
 - b. If the contracting officer decides that negotiated procurement is necessary, the contracting officer must explain briefly which of the four requirements for sealed bidding is not met. I.T.S. Corp., B-243223, 91-2 CPD ¶ 55 (Comp. Gen. July 15, 1991).
 - c. The fact that the requirement was previously procured through sealed bidding procedures is not material to whether the contracting officer's decision was reasonable. Id.; see also Victor Graphics, Inc., B-238290, 90-1 CPD ¶ 407 (Comp. Gen. Apr. 20, 1990) (agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures).
5. Case Study

Facts. Offeror A protested the use of negotiated procedures by the agency, arguing that the agency was required to use sealed bidding procedures under CICA. The solicitation called for construction of an intake canal as part of a flood control project. *All previous canal construction projects were awarded using price or price related factors only.* This time, the agency chose negotiated procedures because it decided to consider six non-price related factors as equal to the price factor. The non-price related factors were past performance, technical approach, duration, personnel experience, project management, and small business subcontracting plan. The agency was also using a compressed time frame because of the urgency of improving flood control in a hurricane stricken area. The solicitation also stated the agency could elect to hold discussions. In considering Offeror A's protest, GAO evaluated the **reasonableness** of the agency's decision to use negotiated procedures. What should the result be?

Negotiated Procurement OK. GAO held that the agency reasonably concluded the procurement required the use of negotiated procedures. The use of the new non-price factors was warranted because of the need to move quickly to restore flood control capabilities to the region. Ceres Environmental Services, Inc., B-310902, 2008 CPD ¶ 48, (Comp. Gen. Mar. 3, 2008) (agency properly used negotiated procedures where compressed time schedule increased the complexity of a project normally awarded by sealed bidding); see Comfort Inn South, B-270819.2, 96-1 CPD ¶ 225 (Comp. Gen. May 14, 1996) (negotiated procedures okay where, after 10 years of using sealed bidding, agency changed to the use of negotiated procedures to consider past performance as a non-price factor in selection of a contractor to provide accommodations for military applicants); TLT Constr. Corp., B-286226, 2000 CPD ¶ 179 (Comp. Gen. Nov. 7, 2000) (complex coordination and scheduling requirements provided reasonable support for negotiated procurement); W.B. Jolley, B-234490, 89-1 CPD ¶ 512 (Comp. Gen. May 26, 1989) (decision to consolidate numerous, diverse services into one contract created a complex procurement justifying use of negotiated procurement procedures).

E. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101.

1. Preparation of the invitation for bids (IFB)
2. Publicizing the invitation for bids
3. Submission of bids
4. Evaluation of bids
5. Contract award

IV. PREPARATION OF INVITATION FOR BIDS

A. Format of the IFB

1. Uniform Contract Format. FAR 14.201-1.

2. Standard Form 33 - Solicitation, Offer and Award.
 3. Standard Form 30 - Amendment of Solicitation; Modification of Contract.
- B. Specifications
1. Clear, complete, and definite
 2. Minimum needs of the government (“no gold plating”)
 3. Preference for commercial items. FAR 12.000 and FAR 12.101(b).
- C. Definition. “Offer” means “bid” in sealed bidding. FAR 2.101.
- D. Contract Type: Contracting officers may use only **firm fixed-price** and **fixed-price with economic price adjustment** contracts in sealed bidding acquisitions. FAR 14.104.

V. PUBLICIZING THE INVITATION FOR BIDS (IFB)

- A. Policy on Publicizing Contract Actions. FAR 5.002. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5. Publicizing contract actions increases competition, broadens industry participation, and assists small business concerns in obtaining contracts and subcontracts.
- B. The publication requirements mandated by FAR 5.02 are covered in Fiscal Law Desk book Chapter 34.
- C. Late receipt of IFB. Failure of a potential bidder to receive an IFB in time to submit a bid, or to receive a requested solicitation at all, does not require postponement of bid opening **unless** adequate competition is not obtained. See Family Carpet Serv. Inc., B-243942.3, 92-1 CPD ¶ 255 (Comp. Gen. Mar. 3, 1992); see also Educational Planning & Advice, B-274513, 96-2 CPD ¶ 173 (Comp. Gen. Nov. 5, 1996) (refusal to postpone bid opening during a hurricane was not an abuse of discretion where adequate competition was achieved and agency remained open for business); Lewis Jamison Inc. & Assocs., B-252198, 93-1 CPD ¶ 433 (Comp. Gen. June 4, 1993) (GAO denies protest where contractor had “last clear opportunity” to avoid being precluded from competing). But see Applied Constr. Technology, B-251762, 93-1 CPD ¶ 365 (Comp. Gen. May 4, 1993) (although agency received 10 bids in response to IFB, GAO sustained protest where agency failed to solicit contractor it had advised would be included on its bidder’s mailing list). Failure to Provide Actual Notice to a Bidder (including the incumbent).

D. Failure to Provide Actual Notice to a Bidder (including the incumbent)

1. Historical. At one time (**but no longer**), the FAR required that “bids shall be solicited from . . . the previously successful bidder.” See superseded FAR §§ 14.205-4 and 15.403. During that time, failure to give notice of a solicitation for supplies or services to a contractor currently providing such supplies or services (i.e., the incumbent) had occasionally been fatal to the solicitation, unless the agency:
 - a. Made a diligent, good-faith effort to comply with statutory and regulatory requirements regarding notice of the acquisition and distribution of solicitation materials; and
 - b. Obtained reasonable prices (competition). Transwestern Helicopters, Inc., B-235187, 89-2 CPD ¶ 95 (Comp. Gen. July 28, 1989) (although the agency failed inadvertently to solicit incumbent contractor, the agency made reasonable efforts to publicize the solicitation, which resulted in 25 bids); but see Professional Ambulance, Inc., B-248474, 92-2 CPD ¶ 145 (Comp. Gen. Sep. 1, 1992) (agency failed to solicit the incumbent and received only three proposals; GAO recommended resolicitation).
2. Current. If the solicitation is posted on FedBizOpps (the current GPE), then the agency has fulfilled any obligation it might have to solicit the incumbent contractor.
 - a. The FAR provides guidance on notification procedures. See FAR Part 5. However, beyond the notification procedures, **the current FAR does not require actual notice to incumbent contractors.**
 - (1) The agency has an affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. Optelec U.S., Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (publicizing on the GPE generally meets this affirmative obligation).
 - (2) Concurrent with the agency’s obligations, prospective contractors must avail themselves of every reasonable opportunity to obtain the solicitation document. See Id.; See also, Laboratory Sys. Servs., Inc., B-258883, 95-1 CPD ¶ 90 (Comp. Gen. Feb. 15, 1995).
 - (3) In protests, GAO will consider whether the agency or the protester had the last clear opportunity to avoid the protester’s being precluded from competing. Optelec U.S.,

Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (once advised the solicitation would be posted on FedBizOpps, it was the protestor's responsibility to take whatever steps were necessary to obtain it); Wind Gap Knitwear, Inc., B-276669, 97-2 CPD ¶ 14 (Comp. Gen. July 10, 1997) (although protestor had not received the actual notice of the solicitation, it was aware of the estimated agency closing date for offers and so it was unreasonable for the protestor to delay contacting the agency about its nonreceipt of the solicitation until after the actual closing date).

- (4) DBI Waste Systems, Inc., B-400687, 2009 CPD ¶ 15 (Comp. Gen. Jan. 12, 2009) (protest that notice of solicitation on Government Point of Entry (GPE) was inadequate because incumbent protester was not notified and lacked internet access was denied).

b. If agency posts solicitation on the GPE, contractor is on constructive notice of the RFP, even if contractor never received actual notice.

- (1) PR Newswire Association, LLC, B-400430, 2008 CPD ¶ 178 (Comp. Gen. Sep. 26, 2008) (GAO held the agency's posting on FedBizOpps put PR Newswire on constructive notice even though a competitor received actual notice because of a prior bid protest agreement. Actual notice of solicitation to incumbent, PR Newswire was not required; posting of solicitation on GPE provided constructive notice).

- (2) CBMC, Inc. B-295586, 2005 CPD ¶ 2 (Comp. Gen. Jan. 6, 2005) (FedBizOpps website places prospective contractors on constructive notice of contract awards); Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, 98-2 CPD ¶ 116 (Comp. Gen. Nov. 20, 1998) (notice in Commerce Business Daily – formerly the official public medium for identifying proposed contract actions and now replaced by FedBizOpps – provides constructive notice of solicitation and contents).

c. Once an agency posts a solicitation on the GPE, it is solely the incumbent contractor's responsibility to take whatever steps are necessary to obtain the solicitation.

d. **Case Study:**

Facts. A bidder requests that the agency provide it with a copy of the solicitation. The agency tells the bidder to register on FedBizOpps for information on the procurement. The bidder registers and also signs up on FedBizOpps to receive an email notice when the solicitation was posted. However, FedBizOpps discontinues its email notification feature and the bidder does not receive notice when the solicitation is posted. The bidder receives actual notice of the solicitation on the day proposals are due. As a result, its bid is late and the agency rejects the bid. The bidder requests that GAO recommend that its offer be considered because the bidder did not received actual notice of the solicitation until the day that proposals were due. Should the bidder's late bid be considered?

No. Once the agency posts the solicitation on FedBizOpps, it becomes the contractor's sole responsibility to monitor the website for the posting of the solicitation. A bidder's decision to use any e-mail notification function on FedBizOpps was at the bidder's own risk. It did not operate to shift responsibility from the contractor to the agency. Optelec U.S., Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008).

VI. SUBMISSION OF BIDS

- A. Safeguarding Bids. FAR 14.401.
 - 1. Bids (including bid modifications) received before the time set for bid opening, shall be kept secure, and generally, must remain unopened in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. FAR 14.401.
 - 2. A bidder generally is not entitled to relief if the agency negligently loses its bid. Vereinigte Gebäudereinigungsgesellschaft, B-252546, 93-1 CPD ¶ 454 (Comp. Gen. June 11, 1993),.
- B. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include method, time and place of submission. FAR 14.301(a). Reasons for specific requirements:
 - 1. Equality of treatment of bidders.
 - 2. Preserve integrity of system.
 - 3. Convenience of the government.
- C. Method of Submission. FAR 14.301.

1. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include the method of submission. FAR 14.301(a). This enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system. Id.; LORS Medical Corp., B-259829.2, 95-1 CPD ¶ 222 (Comp. Gen. Apr. 25, 1995) (bidder's failure to return two pages of IFB does not render bid nonresponsive; submission of signed SF 33 incorporates all pertinent provisions).
 - a. General Rule – Bidders may submit their bids by any written means permitted by the solicitation.
 - b. Unless the solicitation specifically allows it, the contracting officer may not consider telegraphic bids, *i.e.*, those submitted by telegram or by mailgram. FAR 14.301(b); MIMCO, Inc., B-210647.2, 84-1 CPD ¶ 22 (Comp. Gen. Dec. 27, 1983) (telegraphic bid, which contrary to solicitation requirement makes no mention of bidder's intent to be bound by all terms and conditions, is nonresponsive).
 - c. The government will not consider facsimile bids unless permitted by the solicitation. FAR 14.301(c); FAR 14.202-7; Richcon Fed. Contractors, Inc., B-403223, 2010 CPB ¶ 192 (Comp. Gen. Aug. 12, 2010) (agency properly rejected quote that was submitted by facsimile because the request for quotations contained a clause prohibiting this method of submission); Recreonics Corp., B-246339, 92-1 CPD ¶ 249 (Comp. Gen. Mar. 2, 1992) (bid properly rejected for bidder's use of fax machine to transmit acknowledgement of solicitation amendment); but see Brazos Roofing, Inc., B-275113, 97-1 CPD ¶ 43 (Comp. Gen. Jan. 23, 1997) (bidder not penalized for agency's inoperable FAX machine); PBM Constr. Inc., B-271344, 96-1 CPD ¶ 216 (Comp. Gen. May 8, 1996) (ineffective faxed modification had no effect on the original bid, which remained available for acceptance); International Shelter Sys., B-245466, 92-1 CPD ¶ 38 (Comp. Gen. Jan. 8, 1992) (hand-delivered facsimile of bid modification is not a facsimile transmission).
 - d. **Government failure to follow solicitation provisions.** If an agency exercises discretion to waive solicitation requirements *informally*, does it put itself at risk of a sustained protest for manipulating the competitive process?
 - e. Case Study

Facts: Solicitation for food distribution services with three offerors competing. Solicitation did not allow proposals to be submitted by email. It did allow faxes, hand-deliver and mail. However, the agency informally accepted email submission from all three offerors at one time or another. Offeror A sent its final revised proposal by email about 2 ½ hours late. Agency excluded Offeror A because it used email and because it was late. Offeror A protested to GAO. What result?

GAO denied. The protest was late. LaBatt Food Service, Inc., B-310939.6, 2008 CPD ¶ 162, (Comp. Gen. Aug. 19, 2008). Offeror A protests to COFC. What result?

COFC sustained. FAR 15.208(a) provides offeror's may use any transmission method authorized by the solicitation. Email was not authorized. If the agency had followed the FAR, the agency would have had to disqualify all three offeror's at one time or another. Thus, the contract would have had to be recompeted. Offeror A was significantly prejudiced and so had standing to challenge the award of the contract to Offeror B. COFC found the Agency abused their discretion. COFC wrote, "There is a public interest in saluting the language of solicitations. If the agency wants to change the language, use a formal amendment . . . agency discretion to waive solicitation requirements, at different times in the same procurement, and perhaps toward one offeror and not another, renders the procurement process subject to manipulation and unfair competitive advantage." LaBatt Food Service, Inc. v. U.S., 84 Fed. Cl. 50, 65 (2008). The Government appeals to CAFC. What result?

CAFC reversed. Holding that Offeror A did not have standing to challenge the award to Offeror B because Offeror A was not prejudiced by the agency's error of informally allowing email proposals. In order for Offeror A to be prejudiced, it must be harmed by the government error and the informal acceptance of email proposals. While an error, there was no harm to Offeror A. One or more of all the offerors were retained in the competition because the agency informally allowed email submissions. The fact that Offeror A's submission was late is an independent free standing ground to eliminate Offeror A from the competition. LaBatt Food Service v. U.S., 577 F.3d 1375 (Fed. Cir. 2009).

D. Time and Place of Submission. FAR 14.302.

1. Bids shall be submitted so that they will be **received in the office designated** in the IFB not later than the **exact time set** for opening of bids. FAR 14.302(a); 14.304(a)
2. Place of submission = as specified in the IFB. FAR 14.302(a); 14.304(a).
 - a. FAR 14.302(a); see Rodale Electr. Corp., B-221727, 86-1 CPD ¶ 342 (Comp. Gen. Apr. 7, 1986) (an offer is later if it does not arrive at the place designated in the solicitation for the receipt of proposals by the designated time.); J.E. Steigerwald Co., Inc., B-

218536, 85-1 CPD ¶ 453 (Comp. Gen. Apr. 19, 1985) (receipt at other places within the agency, such as the mailroom, is not sufficient); CSLA, Inc., B-255177, 94-1 CPD ¶ 63 (Comp. Gen. Jan. 10, 1994) (hand-carried proposal was “late” where it was delivered via commercial carrier to the *mailing* address rather than the address for *hand-carried* proposals and was received by the contracting officer after the closing time for receipt of proposals); Carolina Archaeological Serv., B-224818, 86-2 CPD ¶ 662 (Comp. Gen. Dec. 9, 1986),.

3. Time of submission = as specified in the IFB. FAR 14.302(a); 14.304(a).
 - a. The official designated as the bid opening officer shall decide when the time set for bid opening has arrived and shall inform those present of that decision. FAR 14.402-1; Action Serv. Corp., B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (the bid opening officer is authorized to decide when the time set for opening has arrived by informing those present of that decision; the officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable); J. C. Kimberly Co., B-255018.2, 94-1 CPD ¶ 79 (Comp. Gen. Feb. 8, 1994); Chattanooga Office Supply Co., B-228062, 87-2 CPD ¶ 221 (Comp. Gen. Sept. 3, 1987) (bid delivered 30 seconds after bid opening officer declared the arrival of the bid opening time is late);
 - b. The bid opening officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable. U.S. Aerospace, Inc., B-403464, B-403464.2, 2010 CPD ¶ 255 (Comp. Gen. Oct. 2, 2010) (the official time maintained by the agency is controlling absent a showing that it was unreasonable); Lani Eko & Company, CPAs, PLLC, B-404863, 2008 CPD ¶ 118 (Comp. Gen. June 6, 2011) (nothing inherently unreasonable with the agency's use of a security guard desk phone clock to determine the solicitation's closing time; no requirement for the time maintained by the agency to be synchronized with protester's personal cell phone or any other phone); General Eng'g Corp., B-245476, 92-1 CPD ¶ 45 (Comp. Gen. Jan. 9, 1992) (may reasonably rely on the bid opening room clock when declaring bid opening time).
 - c. If the bid opening officer has not declared bid opening time, a bid is timely if delivered by the end of the minute specified for bid opening. Amfel Constr., Inc., B-233493.2, 89-1 CPD ¶ 477 (Comp. Gen. May 18, 1989) (bid delivered within 20-50 seconds after bid opening clock “clicked” to the bid opening time was timely where bid opening officer had not declared bid submission period ended); Reliable Builders, Inc., B-249908.2, 93-1 CPD ¶

116 (Comp. Gen. Feb. 9, 1993) (bid which was time/date stamped one minute past time set for bid opening was timely since bidder relinquished control of bid at the exact time set for bid opening).

- d. Arbitrary early or late bid opening is improper. Chestnut Hill Constr. Inc., B-216891, 85-1 CPD ¶ 443 (Comp. Gen. Apr. 18, 1985) (importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that would be obtained by considering a late bid); William F. Wilke, Inc., B-185544, 77-1 CPD ¶ 197 (Comp. Gen. Mar. 18, 1977).

4. Postponement of bid opening. FAR 14.208; FAR 14.402-3.

- a. The government may postpone bid opening **before** the scheduled bid opening time by issuing an amendment to the IFB. FAR 14.208(a).

- b. The government may postpone bid opening even **after** the time scheduled for bid opening if:

- (1) **Segment of bids have been delayed in the mails.** The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence. FAR 14.402-3(a)(1); see Ling Dynamic Sys., Inc., B-252091, 93-1 CPD ¶ 407 (Comp. Gen. May 24, 1993). The contracting officer publicly must announce postponement of bid opening and issue an amendment. FAR 14.402-3(b).

- (2) **Emergency or unanticipated events** interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical. FAR 14.402-3(a)(2). If urgent requirements preclude amendment of the solicitation:

- (a) the time for bid opening is deemed extended until the same time of day on the first normal work day on which Government processes resume; and
- (b) the time of actual bid opening is the cutoff time for determining late bids. FAR 14.402-3(c).
- (c) Hunter Contracting Co., B-402575, 2010 CPD ¶ 93 (Comp. Gen. Mar. 31, 2010) (exception does not apply to a mailed proposal that was not delivered due to a snow storm because the government office

was open and receiving proposals at the time proposals were due).

- (d) Conscoop—Consortia v. US, 62 Fed. Cl. 219 (2004) (exception applied if normal government processes were interrupted); but see Watterson Constr. Co. v US, 98 Fed.Cl. 84, 2011 WL 1137330 (Fed. Cl. Mar. 29, 2011) (recognizing no disruption in government processes but holding that the e-mail “storm” causing delay of delivery of e-mails constituted an “unanticipated event”).

- (e) Case Study:

Facts: Proposals were due by 2 p.m. on the designated day. Severe snowstorms closed the government in Washington D.C. on a day when proposals were scheduled to be received. The agency received proposals on the next day that the Government was open and resumed its normal processes. The agency continued to receive proposals until the designated time (*i.e.*, 2 p.m.) even though there was an authorized two-hour delayed arrival/unscheduled leave policy for government employees that day. Protester submitted its bid at 2:24 p.m. Is the bid late?

Yes. Held that agency acted reasonably as authorized by FAR § 52.212-1(f)(4) (Instructions to Offerors--Commercial Items (June 2008)); the fact that a two hour delayed arrival/unscheduled leave policy for government employees was authorized for that day did not mean normal government processes had not resumed. CFS-INC, JV, B-401809.2, 2010 CPD ¶ 85 (Comp. Gen. Mar. 31, 2010).

E. Amendment of IFB

1. The government must display amendments in the bid room and must send, before the time for bid opening, a copy of the amendment to everyone that received a copy of the original IFB. FAR 14.208(a).
2. Before amending an IFB, the period of time remaining until bid opening and the need to extend this period shall be considered and must be confirmed in the amendment. FAR 14.208(b).
3. If the government furnishes information to one prospective bidder concerning an IFB, it must furnish that same information to all other bidders as an amendment if (1) such information is necessary for bidders to submit bids or (2) the lack of such information would be prejudicial to uninformed bidders. FAR 14.208(c). See Phillip Sitz Constr., B-245941, 92-1 CPD ¶ 101 (Comp. Gen. Jan. 22, 1992); see also Republic Flooring, B-242962, 91-1 CPD ¶ 579 (Comp. Gen. June 18, 1991).

F. The Firm Bid Rule

1. Distinguish common law rule, which allows an offeror to withdraw an offer any time prior to acceptance. See Restatement (Second) of Contracts § 42 (1981).
2. Firm Bid Rule:
 - a. After bid opening, bidders **may not withdraw** their bids during the period specified in the IFB, but must hold their bids open for government acceptance during the stated period. FAR 14.201-6(j) & 52.214-16.
 - b. If the solicitation requires a minimum bid acceptance period, a bid that offers a shorter acceptance period than the minimum is **nonresponsive**. See Banknote Corp. of America, Inc., B-278514, 98-1 CPD ¶ 41 (Comp. Gen. Feb. 4, 1998) (bidder offered 60-day bid acceptance period when solicitation required 180 days and solicitation advised bidders to disregard 60-day bid acceptance period provision contained elsewhere in the solicitation); see also Hyman Brickle & Son, Inc., B-245646, 91-2 CPD ¶ 264 (Comp. Gen. Sept. 20, 1991) (30-day acceptance period offered instead of the required 120 days).
 - c. The bid acceptance period is a **material solicitation requirement**. The government may not waive the bid acceptance period because it affects the bidder's price. Valley Constr. Co., B-243811, 91-2 CPD ¶ 138 (Comp. Gen. Aug. 7, 1991) (60 day period required, 30-day period offered).
 - d. A bid that fails to offer an unequivocal minimum bid acceptance period is ambiguous and nonresponsive. See John P. Ingram Jr. & Assoc., B-250548, 93-1 CPD ¶ 117 (Comp. Gen. Feb. 9, 1993) (bid ambiguous even where bidder acknowledged amendment which changed minimum bid acceptance period); but see Connecticut Laminating Company, Inc., B-274949.2, 99-2 CPD ¶ 108 (Comp. Gen. Dec. 13, 1999) (bid without bid acceptance period is construed as open for a reasonable period of time and is acceptable where solicitation did not require any minimum bid acceptance period).
 - e. Exceptions
 - (1) The government may accept a **solitary bid** that offers less than the minimum acceptance period. Professional Materials Handling Co., -- Recon., B- 205969 (Comp. Gen. May 28, 1982).

- (2) After the bid acceptance period expires, the bidder may extend the acceptance period only where the bidder would not obtain an advantage over other bidders. FAR 14-404-1(d). See Capital Hill Reporting, Inc., B-254011.4, 94-1 CPD ¶ 232 (Comp. Gen. Mar. 17, 1994) (agency may properly request bidders to extend acceptance period, even where acceptance period has expired thus reviving expired bids, where such action does not compromise the integrity of the bidding system); see also NECCO, Inc., B-258131, 94-2 CPD ¶ 218 (Comp. Gen. Nov. 30, 1994) (bidder ineligible for award where bid expired due to bidder's offering a shorter extension period than requested by the agency and award was not made until a subsequent date, despite bidder's subsequent unilateral extension at the expiration of its first extension period).

G. Treatment of Late Bids, Bid Modifications, and Bid Withdrawals. FAR 14.304. "The Late Bid Rule."

1. Definition of "late" –

- a. A "late" bid, bid modification, or bid withdrawal is one that is received in the office designated in the IFB **after** the exact time set for bid opening. FAR 14.304(b)(1).
- b. If the IFB does not specify a time, the time for receipt is 4:30 P.M., local time, for the designated government office. Id.

2. Timeliness of Bids and Solicitations. Both sealed bids and negotiated procurement proposals must be timely. Failure to submit either before the time specified in the IFB or IFP may make the bid or proposal "late" and therefore not eligible for award. More in-depth discussion of timeliness and exception to the "late is late" rule can be found in Chapter 34 of this Desk book.

H. Modifications and Withdrawals of Bids.

1. When may offerors modify their bids?

- a. **Before** bid opening: Bidders may modify their bids at any time before bid opening. FAR 14.303; FAR 52.214-7.
- b. **After** bid opening: Bidders may modify their bids only if:
 - (1) One of the exceptions to the Late Bid Rule applies to the modification. FAR 14.304(b)(1); FAR 52.214-7(b). See FAR exceptions to Late Bid Rule at FAR

14.304(b)(1)(i), (ii), and (b)(2). Government Frustration Rule. I & E Constr. Co., B-186766, 76-2 CPD ¶ 139 (Comp. Gen. Aug. 9, 1976).

- (2) The government may also accept a late modification to an otherwise successful bid if it is more favorable to the government. FAR 14.304(b)(2); FAR 52.214-7(b)(2); Environmental Tectonics Corp., B-225474, 87-1 CPD ¶ 175 (Comp. Gen. Feb. 17, 1987).

- 2. When may offerors withdraw their bids?
 - a. **Before** bid opening: Bidders may withdraw their bids at any time before bid opening. FAR 14.303 and 14.304(e); FAR 52.214-7.
 - b. **After** bid opening. Because of the Firm Bid Rule, bidders generally may withdraw their bids **only if** one of the exceptions to the Late Bid Rule applies. FAR 14.304(b)(1); FAR 52.214-7(b)(1).
- 3. The exceptions to the late bid rule apply to bid modifications and bid withdrawals only if the modification or withdrawal is received **prior to contract award**, unless it is a modification of the successful offeror's bid that makes its terms more favorable to the Government. FAR 14.304(b)(1); FAR 14.304(b)(2).
- 4. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-7(e).
 - a. Offerors may modify or withdraw their bids by any method authorized by the solicitation, which must be received in the office designated in the invitation for bids before the exact time set for bid opening. FAR 14.303(a). See R.F. Lusa & Sons Sheetmetal, Inc., B-281180.2, 98-2 CPD ¶ 157 Comp. Gen. Dec. 29, 1998) (unsigned/uninitiated inscription on outside envelope of bid not an effective bid modification because method was not authorized by the solicitation).

VII. EVALUATION OF BIDS.

- A. Evaluation of **PRICE** – Lowest Priced Bid
 - 1. Award made on basis of lowest price offered.
 - 2. Contracting officer evaluates price and price-related factors. FAR 14.201-8.

3. The bidder must offer a firm, fixed price. FAR 14.104.
4. Evaluating Bids with Options. Evaluate bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in “the government’s best interests.” FAR 17.206. Kruger Construction Inc., Comp. Gen. B-286960, 2001 CPD ¶ 43 (Comp. Gen. Mar. 15, 2001) (not in the government’s best interests to add two option prices when options were alternative). See also, TNT Industrial Contractors, Inc., B-288331, 2001 CPD ¶ 155 (Comp. Gen. Sep. 25, 2001).
5. Check for Unbalanced Pricing. A materially unbalanced bid contains inflated prices for some contract line items and below-cost prices for other line items, and gives rise to a reasonable doubt that award will result in the lowest overall cost to the government. FAR 14.404-2(g); LBCO, Inc., B-254995, 94-1 CPD ¶ 57 (Comp. Gen. Feb. 1, 1994) (inflated first article prices); Semont Travel, Inc., B-291179, 2002 CPD ¶ 200 (Comp. Gen. Nov. 20, 2002). The government **may reject** a materially unbalanced bid if the bid poses an **unreasonable risk** to the government. FAR 14.404-2(g) A materially unbalanced bid may be unreasonable if it will result in unreasonably high prices for contract performance. FAR 14.404-2(f) Cherokee Painting, LLC, B-311020.3, 2009 CPD ¶ 18 (Comp. Gen. January 14, 2009); Accumark Inc., B-310814, 2008 CPD ¶ 68 (Comp. Gen. Feb. 13, 2008).
6. Unreasonably Low Pricing. The contracting officer must always determine that the prices offered are reasonable in light of all prevailing circumstances before awarding a contract. Particular care should be taken if only one bid is received. FAR 14.408-2.
 - a. If a price appears unreasonably low, it could indicate an error. The contracting officer should immediately request the bidder verify the bid. The bidder should be advised, as appropriate, that its bid is so much lower than the other bids or the government’s estimate as to indicate a possibility of error. FAR 14.407-3. See below for discussion on bid mistakes.
 - b. Unreasonably low prices can pose a serious risk to the government if the contractor doesn’t understand the work, cuts corners on product quality or defaults on the work part way through performance. FAR 9.103(c). An unreasonably low price may render the bidder non-responsible in some instances. See Atlantic Maint., Inc., B-239621.2, 90-1 CPD ¶ 523 (Comp. Gen. Jun. 1, 1990) (an unreasonably low price may render bidder non-responsible); but see The Galveston Aviation Weather Partnership, B-252014.2, 93-1 CPD ¶ 370 (Comp. Gen. May 5, 1993) (below-

cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act.) For a further discussion of how responsibility determinations are made, see below.

- c. The Contracting officer has the option of rejecting a bid if he determines, in writing, that the price is unreasonable. He may consider not only the total price of the bid, but also the prices for individual line items. FAR 14.404-2(f).
- d. If the contracting officer rejects the bid and the firm protests, GAO considers the determination of price reasonableness to be within the agency's discretion and it will not be disturbed unless the determination is unreasonable or the record shows that it is the result of fraud or bad faith on the part of the contracting officials. See G. Marine Diesel Corp., B-238703, B-238704, 90-1 CPD ¶ 515 (Comp. Gen. May 31, 1990); Joint Venture Penauille/BMAR & Associates, LLC, B-311200, B-311200.2, 2008 CPD ¶ 118 (Comp. Gen. May 12, 2008) (protest sustained where agency concluded, without explanation, that a low price suggested a lack of understanding of the requirements).

B. Evaluation of **RESPONSIVENESS** of Bids. 10 U.S.C. § 2305.

- 1. Rule. The government may accept only a responsive bid.
 - a. The government must reject any bid that fails to conform to the essential requirements of the IFB. FAR 14.301(a); FAR 14.404-2.
 - b. The government may not accept a nonresponsive bid even though it would result in monetary savings to the government since acceptance would compromise the integrity of the bidding system. MIBO Constr. Co., B-224744, 86-2 CPD ¶ 678 (Comp. Gen. Dec. 17, 1986).
- 2. When is responsiveness determined?
 - a. The contracting officer determines the responsiveness of each bid at the **time of bid opening** by ascertaining whether the bid meets all of the IFB's essential requirements. See Gelco Payment Sys., Inc., B-234957, 89-2 CPD ¶ 27 (Comp. Gen. July 10, 1989). See also Stanger Indus. Inc., B-279380, 98-1 CPD ¶157 (Comp. Gen. June 4, 1998) (agency improperly rejected low bid that used unamended bid schedule that had been corrected by amendment where bidder acknowledged amendments and bid itself committed bidder to perform in accordance with IFB requirements).

2. What is a responsive bid?
 - b. A bid is “responsive” if it unequivocally offers to provide the requested supplies or services IAW the terms and conditions outlined in the IFB.
 - c. A bid is “responsive” unless something on the face of the bid limits, reduces, or modifies the obligation to perform in accordance with the terms of the invitation.
3. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405.
 - a. **Price.** The bidder must offer a firm, fixed price, including all fees and taxes. FAR 14.404-2(d); United States Coast Guard—Advance Decision, B-252396, 93-1 CPD ¶ 286 (Comp. Gen. Mar. 31, 1993) (bid nonresponsive where price included fee of \$1,000 per hour for “additional unscheduled testing” by government); J & W Welding & Fabrication, B-209430, 83-1 CPD ¶ 92 (Comp. Gen. Jan. 25, 1983) (bid was nonresponsive where bid price included a term stating “plus 5% sales tax if applicable”).
 - b. **Quantity.** The bidder must offer the quantity required in the IFB. FAR 14.404-2(b). Inscom Elec. Corp., B-225221, 87-1 CPD ¶ 116 (Comp. Gen. Feb. 4, 1987) (bid limited government’s right to reduce quantity under the IFB); Pluribus Prod., Inc., B-224435, 86-2 CPD ¶ 536 (Comp. Gen. Nov. 7, 1986).
 - c. **Quality.** The bidder must agree to meet the quality requirements of the IFB, no more – no less. FAR 14.404-2(b); Dow Electr. Inc. v. US, 98 Fed. Cl. 688, 2011 WL 2184957 (Fed. Cl. June 2, 2011) (because agency was not obligated to participate in any discussions once bids were submitted, agency properly rejected bid where bidder proposed electrical panels that it argues were equivalent to those required in the IFB); Reliable Mechanical, Inc; Way Eng’g Co., B-258231, 94-2 CPD ¶ 263 (Comp. Gen. Dec. 29, 1994) (bidder offered chiller system which did not meet specifications); Wyoming Weavers, Inc., B-229669.3, 88-1 CPD ¶ 519 (Comp. Gen. June 2, 1988).
 - d. **Delivery.** The bidder must agree to the delivery schedule. FAR 14.404-2(c); Valley Forge Flag Company, Inc., B-283130, 99-2 CPD ¶54 (Comp. Gen. Sept. 22, 1999) (bid nonresponsive where bidder inserts delivery schedule in bid that differs from that requested in the IFB); Viereck Co., B-256175, 94-1 CPD ¶ 310 (Comp. Gen. May 16, 1994) (bid nonresponsive where bidder

agreed to 60-day delivery date only if the cover page of the contract were faxed on the day of contract award). But see Image Contracting, B-253038, 93-2 CPD ¶ 95 (Comp. Gen. Aug. 11, 1993) (bidder's failure to designate which of two locations it intended to deliver did not render bid nonresponsive where IFB permitted delivery to either location).

4. Other bases for rejection of bids for being nonresponsive.

a. Signature on bid.

(1) General rule: Failure to sign the bid is not a minor irregularity, and the government must reject the unsigned bid. See Firth Constr. Co. v. United States, 36 Fed. Cl. 268 (1996) (no signature on SF 1442); Power Master Elec. Co., B-223995, 86-2 CPD ¶ 615 (Comp. Gen. Nov. 26, 1986) (typewritten name); Valencia Technical Serv., Inc., B-223288, 86-2 CPD ¶ 40 (Comp. Gen. July 7, 1986) ("Blank" signature block); but see PCI/RCI v. United States, 36 Fed. Cl. 761 (1996) (one partner may bind a joint venture).

(2) **Exception.** If the bidder has manifested an intent to be bound by the bid, the failure to sign is a minor irregularity. FAR 14.405(c).

(a) Adopted alternative. A & E Indus., B-239846, 90-1 CPD ¶ 527 (Comp. Gen. May 31, 1990) (bid signed with a rubber stamp signature must be accompanied by evidence authorizing use of the rubber stamp signature).

(b) Other signed materials included in bid. Johnny F. Smith Truck & Dragline Serv., Inc., B-252136, 93-1 CPD ¶ 427 (Comp. Gen. June 3, 1993) (signed certificate of procurement integrity); Tilley Constructors & Eng'rs, Inc., B-251335.2, 93-1 CPD ¶ 289 (Comp. Gen. Apr. 2, 1993); Cable Consultants, Inc., B-215138, 84-2 CPD ¶ 127 (Comp. Gen. July 30, 1984).

b. Failure to acknowledge amendment of IFB.

(1) General rule: Failure to acknowledge a **material** amendment renders the bid nonresponsive. MG Mako, Inc., B-404758, 2011 CPD ¶ 88 (Comp. Gen. Apr. 28, 2011).

- (2) Exception: An amendment that is nonessential or trivial need not be acknowledged. FAR 14.405(d)(2); Lumus Construction, Inc., B-287480, 2001 CPD ¶ 108 (Comp. Gen. June 25, 2001) (Where an “amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation,” the amendment is not material); Jackson Enterprises, B-286688, 2001 CPD ¶ 25 (Comp. Gen. Feb. 5, 2001); L&R Rail Serv., B-256341, 94-1 CPD ¶ 356 (Comp. Gen. June 10, 1994) (amendment decreasing cost of performance not material); Day & Night Janitorial & Maid Serv., Inc., B-240881, 91-1 CPD ¶ 1 (Comp. Gen. Jan. 2, 1991) (negligible effect on price, quantity, quality, or delivery).
- (3) Materiality. An amendment is material if it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. ECI Defense Group, B-400177; B-400177.2, 2008 CPD ¶ 141 (Comp. Gen. July 25, 2008) (finding a material amendment where the amendment changed the guaranteed minimum quantity for the base year of a contract from 25 percent to 99 percent of the total estimated quantity under the contract.)
- (4) See Christolow Fire Protection Sys., B-286585, 2001 CPD ¶ 13 (Comp. Gen. Jan. 12, 2001) (Amendments “clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged.” Amendment revising inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls was material.); Environmediation Srvcs., LLC, B-280643, 98-2 CPD ¶ 103 (Comp. Gen. Nov. 2, 1998); see also Logistics & Computer Consultants Inc., B-253949, 93-2 CPD ¶ 250 (Comp. Gen. Oct. 26, 1993) (amendment placing additional obligations on contractor under a management contract); Safe-T-Play, Inc., B-250682.2, 93-1 CPD ¶ 292 (Comp. Gen. Apr. 5, 1993), (amendment classifying workers under Davis-Bacon Act).
- (5) Even if an amendment has no clear effect on the contract price, it is material if it changes the legal relationship of the parties. Specialty Contractors, Inc., B-258451, 95-1 CPD ¶ 38 (Comp. Gen. Jan. 24, 1995) (amendment changing color of roofing panels was material); Anacomp, Inc.,

B-256788, 94-2 CPD ¶ 44 (Comp. Gen. July 27, 1994) (amendment requiring contractor to pickup computer tapes on “next business day” when regular pickup day was a federal holiday); Favino Mechanical Constr., Ltd., B-237511, 90-1 CPD ¶ 174 (Comp. Gen. Feb. 9, 1990) (amendment incorporating Order of Precedence clause).

- (6) How does a bidder acknowledge an amendment?
- (a) In writing only. Oral acknowledgement of an amendment is insufficient. Alcon, Inc., B-228409, 88-1 CPD ¶ 114 (Comp. Gen. Feb. 5, 1988).
 - (b) Formal acknowledgement.
 - (i) Sign and return a copy of the amendment to the contracting officer.
 - (ii) Standard Form 33, Block 14.
 - (iii) Notify the government by letter or by telegram of receipt of the amendment.
 - (c) Constructive acknowledgement. The contracting officer may accept a bid that clearly indicates that the bidder received the amendment. C Constr. Co., B-228038, 87-2 CPD ¶ 534 (Comp. Gen. Dec. 2, 1987) .
- c. Failure to strictly follow the IFB instructions. ATR Logistics Co. LLC, B-402606, 2010 CPD ¶ 140 (Comp. Gen. June 15, 2010) (bid failed to comply in all material respects with IFB where IFB required unit prices for each CLIN; amendment added a sub-CLIN to each CLIN; bidder acknowledged amendment but did not revise bidding schedule); SNAP, Inc., B-402746, 2010 CPD ¶ 165 (Comp. Gen. July 16, 2010) (agency properly rejected proposal where proposals did not redact all identifying information as required by the solicitation).
- d. Ambiguous, indefinite, or uncertain bids. FAR 14.404-2(d); Dow Electr. Inc. v. US, 98 Fed. Cl. 688, 2011 WL 2184957 (Fed. Cl. June 2, 2011) (properly rejected bid where discussions would have been necessary to determine whether proposed electrical panels were equivalent to those required in the IFB); Trade-Winds Envtl. Restoration, Inc., B-259091, 95-1 CPD ¶ 127 (Comp. Gen. Mar. 3, 1995) (bid contained inconsistent prices); Caldwell & Santmyer, Inc., B-260628, 95-2 CPD ¶ 1 (Comp. Gen. July 3, 1995)

(uncertainty as to identity of bidder); Reid & Gary Strickland Co., B-239700, 90-2 CPD ¶ 222 (Comp. Gen. Sept. 17, 1990) (notation in bid ambiguous); New Shawmut Timber Co., B-286881, 2001 CPD ¶ 42 (Comp. Gen. Feb. 26, 2001) (bid was nonresponsive where blank line item “rendered the bid equivocal regarding whether [protestor] intended to obligate itself to perform that element of the requirement”)

- e. Variation of acceptance period. John’s Janitorial Serv., B-219194, 85-2 CPD ¶ 20 (Comp. Gen. July 2, 1985).
- f. Placing a “confidential” stamp on bid. Concept Automation, Inc. v. General Accounting Office, GSBICA No. 11688-P, Mar. 31, 1992, 92-2 BCA ¶ 24,937. But see North Am. Resource Recovery Corp., B-254485, 93-2 CPD ¶ 327 (Comp. Gen. Dec. 17, 1993) (“proprietary data” notation on cover of bid did not restrict public disclosure of the bid where no pages of the bid were marked as proprietary).
- g. Bid conditioned on receipt of local license. National Ambulance Co., B-184439, 75-2 CPD ¶ 413 (Comp. Gen. Dec. 29, 1975).
- h. Requiring government to make progress payments. Vertiflite, Inc., B-256366, 94-1 CPD ¶ 304 (Comp. Gen. May 12, 1994).
- i. Failure to furnish required or adequate bid guarantee.
 - (1) Bid Guarantee. A form of security ensuring that a bidder will, (1) not withdraw a bid within the period specified for acceptance, and (2) if required, execute a written contract and furnish payment and performance bonds within the time period specified in the solicitation. FAR § 28.001.
 - (2) A bid guarantee is also available to offset the cost of procurement of the goods and services. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. The surety for a bid bond can be either an individual surety or a corporate surety, although there are different requirements for each. Paradise Constr. Co., B-289144, 2001 CPD ¶ 192 (Comp. Gen. Nov. 26, 2001). See FAR Part 28 generally.
 - (3) Policy. Where a solicitation requires a bidder to submit a bid guarantee with the bid, and the bidder fails to do so (and no exception applies), the bid must be rejected. Affording a bidder the opportunity to supply its bid

guarantee later provides the bidder the option of accepting or rejecting the award by either correcting or not correcting a deficiency after award, which would be inconsistent with the sealed bidding system. Simont S.p.A., B-400481, 2008 CPD ¶ 179 (Comp. Gen. Oct. 1, 2008) (Agency properly found bidder non-responsive for failing to submit a bid guarantee notwithstanding a patent error to a mislabeled IFB amendment stated a bid guarantee was being deleted.)

- (4) Interstate Rock Products, Inc. v. United States, 50 Fed. Cl. 349 (2001) (COFC seconded a long line of GAO decisions holding that “the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive); Schrepfer Industries, Inc., B-286825, 2001 CPD ¶ 23 (Comp. Gen. Feb. 12, 2001) (photocopied power of attorney unacceptable); Quantum Constr., Inc., B-255049, 93-2 CPD ¶ 304 (Comp. Gen. Dec. 1, 1993) (defective power of attorney submitted with bid bond); Kinetic Builders, Inc., B-223594, 86-2 CPD ¶ 342 (Comp. Gen. Sept. 24, 1986) (bond referenced another solicitation number); Clyde McHenry, Inc., B-224169, 86-2 CPD ¶ 352 (Comp. Gen. Sept. 25, 1986) (surety’s obligation under bond unclear). But see, FAR 28.101-4(c) (setting forth nine exceptions to the FAR’s general requirement to reject bids with noncompliant bid guarantees); South Atlantic Construction Company, LLC., B-286592.2, 2001 CPD ¶ 63 (Comp. Gen. Apr. 13, 2001); Hostetter, Keach & Cassada Constr., LLC, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010) (responsive despite discrepancy in the names of the bidder and bid bond principal where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government).
- (5) All Seasons Construction, Inc. v. United States, 55 Fed. Cl. 175 (2003) (all documents accompanying a bid bond, including the power of attorney appointing the attorney-in-fact, must unequivocally establish, at bid opening, that the bond is enforceable against the surety).
- (6) Example: An individual surety with assets described as an “allocated portion of \$191,350,000.00 of previously mined, extracted, stockpiled and marketable coal, located on property X” is not a valid bid bond because the assets are not able to be placed in an escrow account. The government’s interest in a security asset in escrow must be

made perfect through filing, rather than by taking possession. Tip Top Construction Corporation, B-311305, 2008 CPD ¶ 91 (Comp. Gen. May 2, 2008). FAR 28.203-1.

- (7) Example: Bidder's pledge of allocated portion of previously mined, extracted, stockpiled, and marketable coal located on surety's property was not acceptable asset under FAR 28.203-2(b, c) because coal was a speculative asset with value highly dependent upon variables such as type, quality, and provenance of coal proffered, rather than assert that was readily marketable with identifiable value and liquidity. Tip Top Constr. Corp. v. United States, 563 F.3d 1338 (2009).
- j. Exception to liquidated damages. Dubie-Clark Co., B-186918, 76-2 CPD ¶ 194 (Comp. Gen. Aug. 26, 1976).
- k. Solicitation requires freight on board (F.O.B.) *destination* (contractor responsible for shipping costs and liability); bid states F.O.B. *origin* (government responsible for shipping costs and liability). Taylor-Forge Eng'd Sys., Inc., B-236408, 89-2 CPD ¶ 421 (Comp. Gen. Nov. 3, 1989).
- l. Descriptive Literature. Contracting Officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specifications and to establish exactly what the bidder proposes to furnish. See FAR 14.202-5 and 52.214-21. Adrian Supply Co., B-250767, 93-1 CPD ¶ 131 (Comp. Gen. Feb. 12, 1993). **NOTE:** The contracting officer generally should disregard **unsolicited** descriptive literature. However, if the unsolicited literature raises questions reasonably as to whether the offered product complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. FAR 14.202-5(e); FAR 14.202-4(f); Delta Chem. Corp., B-255543, 94-1 CPD ¶ 175 (Comp. Gen.)Mar. 4, 1994); Amjay Chems., B-252502, 93-1 CPD ¶ 426 (Comp. Gen. May 28, 1993).
- m. Conditional terms. Tel-Instrument Electronics Corp. 56 Fed. Cl. 174, Apr. 8, 2003 (a bid conditioned on the use of equipment not included in the solicitation, requiring special payment terms, or limiting its warranty obligation modifies a material requirement and is nonresponsive); New Dimension Masonry, Inc., B-258876, 95-1 CPD ¶ 102 (Comp. Gen. Feb. 21, 1995) (statements in cover

letter limiting rights of the government expressly reserved in the solicitation conditioned the bid).

- n. Objection to indemnification requirements changed legal relationship anticipated in IFB. Metric Sys. Corp., B-256343, 94-1 CPD ¶ 360 (Comp. Gen. June 10, 1994) (bidder's exception to IFB indemnification requirements changed legal relationship between parties).

C. Minor Informalities or Irregularities in Bids. FAR 14.405.

- 1. Rule. Discretionary decision—the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the government's advantage. FAR 14.405; Excavation Constr. Inc. v. US, 494 F.2d 1289 (Ct. Cl. 1974).

2. What is a minor irregularity?

- a. **Definition:** A minor informality or irregularity is merely a matter of form, not of substance. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of supplies or services acquired. FAR 14.405.
- b. To determine whether a defect or variation is immaterial, review the facts of the case with the following considerations:
 - (1) whether item is divisible from solicitation requirements;
 - (2) whether cost of item is *de minimis* as to contractor's total cost; and
 - (3) whether waiver or correction clearly would not affect competitive standing of bidders.

Red John's Stone Inc., B-280974, 98-2 CPD ¶ 135 (Comp. Gen. Dec. 14, 1998).

- c. Examples of minor irregularities.
 - (1) Failure to return the number of copies of signed bids required by the IFB. FAR 14.405(a).
 - (2) Failure to furnish required information concerning the number of an employer's employees. FAR 14.405(b)

- (3) Failure to sign the bid if it is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid; or the firm submitting a bid has formally adopted or authorized, before date of bid opening, the execution of documents by typewritten, printed, or stamped signature, submitted evidence of the authorization and the bid carries such a signature. FAR 14.405(c).
- (4) Failure to submit employer identification number. Dyneteria, Inc., B-186823, 76-2 CPD ¶ 338 (Comp. Gen. Oct. 18, 1976).
- (5) Mere discrepancy in the names of the bidder and bid bond principal is a minor informality where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government. Hostetter, Keach & Cassada Constr., LLC, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010).
- (6) Use of abbreviated corporate name if the bid otherwise establishes the identity of the party to be bound by contract award. Americorp, B-232688, 88-2 CPD ¶ 515 (Comp. Gen. Nov. 23, 1988) (bid also gave Federal Employee Identification Number).
- (7) Failure to certify as a small business on a small business set-aside. See J. Morris & Assocs., B-259767, 95-1 CPD ¶ 213 (Comp. Gen. Apr. 25, 1995) (bidder may correct erroneous certification after bid opening where a bidder's actual status is clear).
- (8) Failure to initial bid correction. Durden & Fulton, Inc., B-192203, 78-2 CPD ¶ 172 (Comp. Gen. Sept. 5, 1978).
- (9) Failure to price individually each line item on a contract to be awarded on an "all or none" basis. See Seaward Corp., B-237107.2, 90-1 CPD ¶ 552 (Comp. Gen. June 13, 1990); *see also* Vista Contracting, Inc., B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61 (failure to indicate cumulative bid price where bid pricing schedule is complete and bidder's total price offer is easily determined on face of bid documents).
- (10) Failure to furnish information with bid, if the information is not necessary to evaluate bid and bidder is bound to perform in accordance with the IFB. W.M. Schlosser Co., B-258284, 94-2 CPD ¶ 234 (Comp. Gen. Dec. 12, 1994)

(equipment history not submitted); *but see* Booth & Assocs., Inc. - - Advisory Opinion, B-277477.2, 98-1 CPD ¶104 (Comp. Gen. Mar. 27, 1998) (agency properly reinstated bid previously rejected as non-responsive where bidder failed to include completed supplemental schedule of hourly rates but schedule was not used in the bid price evaluation and omission did not affect the bidder's promise to perform as specified).

- (11) Negligible variation in quantity. Alco Env'tl. Servs., Inc., ASBCA No. 43183, 94-1 BCA ¶ 26,261 (variation in IFB quantity of .27 percent).
- (12) Failure to acknowledge amendment of the solicitation if the bid is clearly based on the IFB as amended, or the amendment is a matter of form or has a negligible impact on the cost of contract performance. See FAR 14.405(d).

3. Statutory/Regulatory Compliance.

a. Licenses and permits.

- (1) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. James C. Bateman Petroleum Serv., Inc., B-232325, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988); *but see* International Serv. Assocs., B-253050, 93-2 CPD ¶ 82 (Comp. Gen. Aug. 4, 1993) (where agency determines that small business will not meet licensing requirement, referral to SBA required).
- (2) On the other hand, when a solicitation requires **specific** compliance with state and local regulations, compliance with such regulations is a pre-requisite to award. Washington Petrol Serv., Inc., B-195900, 80-2 CPD ¶ 132 (Comp. Gen. Aug. 19, 1980); James C. Bateman Petroleum Serv., Inc., B-232325, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988).

b. Statutory certification requirements.

- (1) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.

- (2) Equal opportunity compliance. Contractors must certify that they will comply with “equal opportunity” statutory requirements. In addition, contracting officers must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract (excluding construction) exceeding \$10 million. FAR Subpart 22.8. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; Westinghouse Elec. Corp., B-228140, 88-1 CPD ¶ 6 (Comp. Gen. Jan. 6, 1988).
 - (3) Submission of lobby certification. Tennier Indus., B-239025, 90-2 CPD ¶ 25 (Comp. Gen. July 16, 1990).
 - c. Organizational conflicts of interest. FAR 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.502(c); The Analytic Sciences Corp., B-218074, 85-1 CPD ¶ 464 (Comp. Gen. Apr. 23, 1985). For more information see Chapter 34.
- D. Mistakes in Bids Asserted Before Award. FAR 14.407-1.
 - 1. General rule.
 - a. A bidder bears the consequences of a mistake in its bid unless the contracting officer has **actual or constructive notice** of the mistake prior to award. Advanced Images, Inc., B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).
 - b. After bid opening, the government may permit the bidder to remedy certain substantive mistakes affecting price and price-related factors by correction or withdrawal of the bid.
 - 2. Mistakes in bid that **ARE** correctable.
 - a. A clerical or arithmetical error apparent on its face in the bid normally is correctable or may be a basis for withdrawal. FAR 14.407-2.
 - b. FAR examples: obvious misplacement of a decimal point; obviously incorrect discounts; obvious reversal of the price F.O.B.

destination and price F.O.B. origin; and obvious mistake in designation of unit. FAR 14.407-2(a)(1)-(4).

- c. United Digital Networks, Inc., B-222422, 86-2 CPD ¶ 79 (Comp. Gen. July 17, 1986) (multiplication error); but see Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper);

3. Mistakes in bid that are **NOT** correctable.

- a. Errors in judgment. R.P. Richards Constr. Co., B-274859.2, 97-1 CPD ¶ 39 (Comp. Gen. Jan. 22, 1997) (bidder's misreading of a subcontractor quote and reliance on its own extremely low estimate for certain work were mistakes in judgment); Central Builders, Inc., B-229744, 88-1 CPD ¶ 195 (Comp. Gen. Feb. 25, 1988) (bid may not be corrected after bid opening where the bid submitted was the bid intended, even though it was later discovered that the bid was revised lower based upon an erroneous interpretation of the specifications)
- b. Omission of items from the bid. McGhee Constr., Inc., B-255863, 94-1 CPD ¶ 254 (Comp. Gen. Apr. 13, 1994) (bid may not be corrected after bid opening where the bidder did not intend to include in its bid any additional amounts for the work involved); but see Pacific Components, Inc., B-252585, 93-1 CPD ¶ 478 (Comp. Gen. June 21, 1993) (bid correction permitted to revise bid upwards for mistake due to omissions from subcontractor quotation).
- c. Nonresponsive bid. FAR 14.407-3. Temp Air Co., Inc., B-279837, 98-2 CPD ¶ 1 (Comp. Gen. Jul. 2, 1998) (bid could not be made responsive by post-bid opening explanation or correction).
- d. Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper).

4. Only the government and the bidder responsible for the alleged mistake have standing to raise the issue of a mistake. Reliable Trash Serv., Inc., B-258208, 94-2 CPD ¶ 252 (Comp. Gen. Dec. 20, 1994).

5. Contracting Officer's responsibilities.

- a. **Examine each bid for mistakes.** FAR 14.407-1; Andy Elec. Co.—Recon., B-194610.2, 81-2 CPD ¶ 111 (Comp. Gen. Aug. 10, 1981).
 - (1) **Actual** notice of mistake in a bid. FAR 14.407-3.
 - (2) **Constructive** notice of mistake in a bid, *e.g.*, price disparity among bids or comparison with government estimate. R.J. Sanders, Inc. v. United States, 24 Cl. Ct. 288 (1991) (bid 32% below government estimate insufficient to place contracting officer on notice of mistake in bid); Central Mechanical, Inc., B-206250, 82-2 CPD ¶ 547 (Comp. Gen. Dec. 20, 1982) (allocation of price out of proportion to other bidders).
- b. Verify bid if reason to believe contains a mistake. FAR 14.407-1 and 14.407-3(g)
 - (1) When does the duty arise? CTA Inc. v. U.S. 44 Fed.Cl. 684, 694 (Fed. Cl. 1999) (government's duty to warn arises only when the government either knew or should have known that a bid contains a mathematical or typographical error or is based on a misreading of the contract specifications).
 - (2) How does the contracting office put the bidder on notice? To ensure that the bidder is put on notice of the suspected mistake, the contracting officer must advise the bidder of all disclosable information that leads the contracting officer to believe that there is a mistake in the bid. Liebherr Crane Corp., ASBCA No. 24707, 85-3 BCA ¶ 18,353, aff'd 810 F.2d 1153 (Fed. Cir. 1987) (procedure inadequate); but see Foley Co., B-258659, 95-1 CPD ¶ 58 (Comp. Gen. Feb. 8, 1995) (bidder should be allowed an opportunity to explain its bid); DWS, Inc., ASBCA No. 29743, 93-1 BCA ¶ 25,404 (particular price need not be mentioned in bid verification notice).
 - (3) What is the effect of bidder verification? Verification generally binds the contractor unless the discrepancy is so great that acceptance of the bid would be unfair to the submitter or to other bidders. Trataros Constr., Inc., B-254600, 94-1 CPD ¶ 1 (Comp. Gen. Jan. 4, 1994) (contracting officer properly rejected verified bid that was far out of line with other bids and the government estimate). But see Foley Co., B-258659, 95-1 CPD ¶ 58

(Comp. Gen. Feb. 8, 1995) (government improperly rejected low bid where there was no evidence of mistake); Aztech Elec., Inc. and Rod's Elec., Inc., B-223630, 86-2 CPD ¶ 368 (Comp. Gen. Sept. 30, 1986) (below-cost bid is a matter of business judgment, not an obvious error requiring rejection).

- (4) What if the contracting officer fails to obtain adequate verification? If the contracting officer fails to obtain adequate verification of a bid for which the government has actual or constructive notice of a mistake, the contractor may seek additional compensation or rescission of the contract. See, e.g., Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

- c. The contracting officer may not award a contract to a bidder when the contracting officer has actual or constructive notice of a mistake in the bid, unless the mistake is waived or the bid is properly corrected in accordance with agency procedures. Sealtite Corp., ASBCA No. 25805, 83-1 BCA ¶ 16,243.

6. **Correction of mistakes PRIOR to award.** FAR 14.407-2; 14.407-3.

- a. The bidder alleging the mistake has the burden of proof. VA—Advance Decision, B-225815.2, 87-2 CPD ¶ 362 (Comp. Gen. Oct. 15, 1987).
- b. Apparent clerical mistakes. FAR 14.407-2.
- (1) General Rule: Contracting officer may correct, before award, any clerical mistake apparent on the face of the bid. FAR 14.407-2(a).
- (2) However, the contracting officer must first obtain verification of the bid from the bidder. FAR 14.407-2(a).
- (3) Brazos Roofing, Inc., B-275319, 97-1 CPD ¶ 66 (Comp. Gen. Feb. 7, 1997) (incorrect entry of base price used in calculation of option year prices was an obvious transcription error); Action Serv. Corp., B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (additional zero); Sovran Constr. Co., B-242104, 91-1 CPD ¶ 295 (Comp. Gen. Mar. 18, 1991) (cumulative pricing); Engle Acoustic & Tile, Inc., B-190467, 78-1 CPD ¶ 72 (Comp. Gen. Jan. 27, 1978) (misplaced decimal point); Dependable

Janitorial Serv. & Supply Co., B-188812, 77-2 CPD ¶ 20 (Comp. Gen. July 13, 1977) (discrepancy between unit and total prices); B&P Printing, Inc., B-188511, 77-1 CPD ¶ 387 (Comp. Gen. June 2, 1977) (comma rather than period making bid reasonably subject to two interpretations only one of which was low bid, bidder may not explain mistake).

c. Other mistakes disclosed before award. FAR 14.407-3.

(1) Correction by low bidder.

- (a) Burden of proof: The low bidder must show by clear and convincing evidence: (i) the existence of a mistake in its bid; and (ii) the bid actually intended or that the intended bid would fall within a narrow range of uncertainty and remain low. FAR 14.407-3.
- (b) Permissible evidence: Bidder can refer to such things as: (i) bidder's file copy of the bid; (ii) original work papers; (iii) a subcontractor's or supplier's quotes; or (iv) published price lists. FAR 14.407-3(g)(2).
- (c) Example: Shoemaker & Alexander, Inc., B-241066, 91-1 CPD ¶ 41 (Comp. Gen. Jan. 15, 1991) (upward correction of a mistake in bid resulting from alleged failure to include proper subcontractor costs is permissible where evidence consisting of the bidder's worksheets, the subcontractor's quotations, and an adding machine tape clearly and convincingly demonstrate both the existence of a mistake and the intended bid, and the bid as corrected remained below the next low bid by approximately 3 percent).
- (d) Other examples: Three O Constr., S.E., B-255749, 94-1 CPD ¶ 216 (Comp. Gen. Mar. 28, 1994) (no clear and convincing evidence where bidder gave conflicting explanations for mistake); Will H. Hall and Son, Inc. v. United States, 54 Fed. Cl. 436 (2002), (contractor's "careless" reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable mistake); Circle, Inc., B-279896, 98-2 CPD ¶ 67 (Comp. Gen. July 29, 1998)(correction not

permitted where agency reasonably found that discrepancies in the worksheets, as well as other evidence provided, did not establish intended bid)

- (2) Correction of a bid that **displaces a lower bidder**.
 - (a) **Burden of proof:** Bidder must show by clear and convincing evidence: (a) the existence of a mistake; and (b) the bid actually intended. FAR 14.407-3; J & J Maint., Inc., B-251355, 93-1 CPD ¶ 187 (Comp. Gen. Mar. 1, 1993) (correction permitted where unit price clearly is out of line with both the government estimate and the prices offered by the other bidders, and only the extended price reasonably can be regarded as having been the intended bid); Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990); Eagle Elec., B-228500, 88-1 CPD ¶ 116 (Comp. Gen. Feb. 5, 1988).
 - (b) **Limitation on proof** - the bidder can prove a mistake only from the solicitation (IFB) and the bid submitted, not from any other sources. Bay Pacific Pipelines, Inc., B-265659, 95-2 CPD ¶ 272 (Comp. Gen. Dec. 18, 1995).

Example: The Navy issued an IFB for dredging services at a submarine base. The IFB required bidders to supply both unit prices and extended prices for 10 line items with a total of the extended prices for lines. Bidders had to submit an original and one copy of their bids. At bid opening, there were two bidders. Bidder A showed a “lump sum” mobilization line item as \$425,000 per item and an extended price of \$1,425,000. (Lump sum meant the unit price and extended price should have been identical.) Bidder A’s total price reflected that the mobilization line item price should have been \$1,425,000. Bidder A’s handwritten copy of its bid reflected \$1,425,000 in both the unit and the extended line item blocks. However, the IFB stated “in the event there is a difference between a unit price and the extended total, the unit price will be held to be the intended bid.” Bidder B protests that the Navy should reject Bidder A’s bid. Can Bidder A correct its line item price to \$1,425,000?

Yes. There is considerable evidence from the bid itself that Bidder A made a clerical mistake by mistakenly omitting the digit “1” from its mobilization unit price on the “original” bid. The intended bid was readily discernable. Notwithstanding solicitation provisions that give precedence to unit prices, an obviously erroneous unit price can be corrected to correspond to an extended total price where the corrected unit price is the only reasonable interpretation of the bid. Cashman Dredging and Marine Contracting Co. LLP, B-401547, 2009 CPD ¶ 179 (Comp. Gen. Aug. 31, 2009).

- d. Action permitted when a bidder presents clear and convincing evidence of a mistake, but not as to the bid intended; or evidence that reasonably supports the existence of a mistake, but is not clear and convincing. Advanced Images, Inc., B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).
 - (1) The bidder may withdraw the bid, IAW FAR 14.407-3(c).
 - (2) The bidder may correct the bid where it is clear the intended bid would fall within a narrow range of uncertainty and remain the low bid. Conner Bros. Constr. Co., B-228232.2, 88-1 CPD ¶ 103 (Comp. Gen. Feb. 3, 1988); Department of the Interior—Mistake in Bid Claim, B-222681, 86-2 CPD ¶ 98 (Comp. Gen. July 23, 1986).
 - (3) The bidder may waive the bid mistake if it is clear that the intended bid would remain low. William G. Tadlock Constr., B-251996, 93-1 CPD ¶ 382 (Comp. Gen. May 13, 1993) (waiver not permitted where insufficient evidence of intended bid price and that it would remain the low bid); Hercules Demolition Corp. of Virginia, B-223583, 86-2 CPD ¶ 292 (Comp. Gen. Sep. 12, 1986); LABCO Constr., Inc., B-219437, 85-2 CPD ¶ 240 (Comp. Gen. Aug. 28, 1985).
- e. Once a bidder asserts a mistake, the agency head or designee may disallow withdrawal or correction of the bid if the bidder fails to prove the mistake. FAR 14.407-3(d); Duro Paper Bag Mfg. Co., B-217227, 86-1 CPD ¶ 6 (Comp. Gen. Jan. 3, 1986).
- f. Approval levels for corrections or withdrawals of bids.
 - (1) Apparent clerical errors: The contracting officer. FAR 14.407-2.
 - (2) Withdrawal of a bid on clear and convincing evidence of a mistake, but not of the intended bid: An official above the contracting officer. FAR 14.407-3(c).

- (3) Correction of a bid on clear and convincing evidence both of the mistake and of the bid intended: The agency head or delegee. FAR 14.407-3(a), FAR 14.407-3(e). **Caveat:** If correction would displace a lower bid, the government shall not permit the correction unless the mistake and the intended bid are both ascertainable substantially from the IFB and the bid submitted. FAR 14.407-3(a).
- (4) Withdrawal rather than correction of a low bidder's bid: If (a) a bidder requests permission to withdraw a bid rather than correct it, (b) the evidence is clear and convincing both as to the mistake in the bid and the bid intended, and (c) the bid, both as uncorrected and as corrected, is the lowest received, the agency head or designee may determine to correct the bid and not permit its withdrawal. FAR 14.407-3(b).
- (5) Neither correction nor withdrawal. If the evidence does not warrant correction or withdrawal, the agency head may refuse to permit either withdrawal or correction. FAR 14.407-3(d).
- (6) Heads of agencies may delegate their authority to correct or permit withdrawal of bids without power of redelegation. FAR 14.407-3(e). This authority has been delegated to specified authorities within Defense Departments and Agencies. *See* individual Agency FAR Supplements.

E. **Mistakes asserted AFTER** award. FAR 14.407-4; FAR 33.2 (Disputes and Appeals).

1. If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of FAR 33.2 and FAR 14.407-4.
2. The mistake may be corrected by contract modification *IF*:
 - a. Correcting the mistake would be **favorable** to the government without changing the essential requirements of the specifications. FAR 14.407-4(a).
 - b. The contractor demonstrates by **clear and convincing** evidence that a mistake in bid was made and it must be clear the mistake was mutual or, if unilateral, so apparent as to have charged the

contracting officer with notice of the probability of the mistake. FAR 14.407-4(c); Government Micro Resources, Inc. v. Department of Treasury, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (government on constructive notice of mistake where contractor's price exceeded government estimate by 62% and comparison quote by 33%); Kitco, Inc., ASBCA No. 45347, 93-3 BCA ¶ 26,153 (mistake must be clear cut clerical or arithmetical error, or misreading of specifications, not mistake of judgment); Liebherr Crane Corp., 810 F.2d 1153 (Fed. Cir. 1987) (no relief for unilateral errors in business judgment).

3. The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence. *See* Government Micro Resources, Inc. v. Department of Treasury, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (board awards contractor recovery on *quantum valebant* basis).
4. The government may (FAR 14.407-4(b)):
 - a. Rescind the contract.
 - b. Reform (modify) the contract to:
 - (1) Delete the items involved in the mistake; or
 - (2) Increase the price IF the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB.
 - c. Make no change if the evidence does not warrant deleting the items or increasing the price.
 - d. Note: The requirement under FAR 14.407-4(c) must be met where the Government intends to rescind or reform the contract pursuant to FAR 14.407-4(b)
 - e. Approval Levels. *See* individual Agency FAR Supplements.
5. Contract Reformation.
 - a. To show entitlement to reformation, the contractor must prove (i) a clear agreement between the parties and (ii) an error in reducing the agreement to writing. Gould, Inc. v. United States, 19 Cl. Ct. 257, 264 (1990)
 - b. Reformation is a form of equitable relief that applies to mistakes made in reducing the parties' intentions to writing, but not to

mistakes that the parties made in forming the agreement. Hence, reformation is not available for contract formation mistakes. Gould, Inc. v. United States, 19 Cl. Ct. 257, 269 (1990) (reformation not permitted where plaintiff complains of a mistake in the forming the agreement, not in reducing the parties' agreement to writing).

c. The contractor must prove four elements in a claim for reformation based on mutual mistake. Management & Training Corp. v. General Servs. Admin., GSBCA No. 11182, 93-2 BCA ¶ 25,814; Gould, Inc. v. United States, 19 Cl. Ct. 257, 269 (1990). These elements are:

- (1) The parties to the contract were mistaken in their belief regarding a fact. See Dairyland Power Co-op v. United States, 16 F.3d 1197 (1994) (mistake must relate to an existing fact, not future events);
- (2) The mistake involved a basic assumption of the contract;
- (3) The mistake had a material effect on the bargain; and
- (4) The contract did not put the risk of mistake on the party seeking reformation.

d. The contractor must prove five elements in a claim for reformation based on the unilateral mistake of the bidder. Red Gold, Inc., Appellant v. Dept. of Agriculture, Respondent, CBCA 2639, July 06, 2012, 2012 WL 2869697. These elements are:

- (1) Mistake in fact occurred prior to contract award;
- (2) Mistake was clear cut clerical or mathematical error or misreading of the specifications;
- (3) Prior to the award, the Government knew or should of known that a mistake had been made;
- (4) The Government did not request bid verification; and
- (5) Proof of the intended bid. *See also* FAR 14.407-4.

6. Mistakes alleged after award are subject to the Contract Disputes Act of 1978 and the Disputes and Appeals provisions of the FAR; FAR Subpart 33.2; ABJ Servs., B-254155, 93-2 CPD ¶ 53 (Comp. Gen. July 23, 1993) (the GAO will not review a mistake in bid claim alleged by the contractor after award).

7. Extraordinary contractual relief under Public Law No. 85-804. National Defense Contracts Act, 72 Stat. 972, 50 U.S.C. § 1431-1435; DFARS Subpart 250.

F. Rejection of All Bids—Cancellation of the IFB.

1. **Prior** to bid opening, almost any reason will justify cancellation of an invitation for bids if the cancellation is “in the public interest.” FAR 14.209.
2. **After** bid opening, the government may not cancel an IFB unless there is a **compelling reason** to reject all bids and cancel the invitation. FAR 14.404-1(a)(1); P. Francini & Co., Inc. v. U.S., 2 Cl.Ct. 7, 10 (Cl.Ct., 1983) (citing Massman Construction Co. v. United States, 102 Ct. Cl. 699, 719 (1945) (“to have a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it should not be permitted except for cogent reasons.”)).
3. Examples of compelling reasons to cancel.
 - a. Violation of statute. Sunrise International Group, B-252892.3, 93-2 CPD ¶ 160 (Comp. Gen. Sep. 14, 1993) (agency’s failure to allow 30 days in IFB for submission of bids in violation of CICA was compelling reason to cancel IFB).
 - b. Insufficient funds. Michelle F. Evans, B-259165, 95-1 CPD ¶ 139 (Comp. Gen. Mar. 6, 1995) (management of funds is a matter of agency judgment); Armed Forces Sports Officials, Inc., B-251409, 93-1 CPD ¶ 261 (Comp. Gen. Mar. 23, 1993) (no requirement for agency to seek increase in funds where all bids exceed amount available for procurement).
 - c. Requirement disappeared. Zwick Energy Research Org., Inc., B-237520.3, 91-1 CPD ¶ 72 (Comp. Gen. Jan. 25, 1991) (specification required engines driven by gasoline; agency directive required diesel).
 - d. Specifications are defective and fail to state the government’s minimum needs, or unreasonably exclude potential bidders. McGhee Constr., Inc., B-250073.3, 93-1 CPD ¶ 379 (Comp. Gen. May 13, 1993); Control Corp.; Control Data Sys., Inc.—Protest and Entitlement to Costs, B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993) (compelling reason to cancel procurement where solicitation overstated service call response time needed); Digitize, Inc., B-235206.3, 90-1 CPD ¶ 403 (Comp. Gen. Oct. 5, 1989) (agency determined government needs satisfied by products meeting less restrictive specifications and award to protestor would

not be fair to competitors); Chenga Management, B-290598, 2002-1 CPD ¶ 143 (Comp. Gen. Aug. 8, 2002) (specifications that are impossible to perform in required time period provide a basis to cancel the IFB after bid opening); Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the “awardable range” and agency concluded that specifications were unclear).

- e. Agency determines to perform the services in-house. Mastery Learning Sys., B-258277.2, 95-1 CPD ¶ 54 (Comp. Gen. Jan. 27, 1995) (agency reasonably determined performing services in-house was in its best interest because it would assure continuity of services).
- f. Time delay of litigation. P. Francini & Co. v. United States, 2 Cl. Ct. 7 (1983) (cancellation was justified in light of the delay that would have attended an appeal of the court’s preliminary injunction and taken longer to resolve than resoliciting the IFB); but see Northern Virginia Van Co. Inc. v. U.S., 3 Cl. Ct. 237, 242 (1983).
- g. All bids unreasonable in price. California Shorthand Reporting, B-250302.2, 93-1 CPD ¶ 202 (Comp. Gen. Mar. 4, 1993); Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the “awardable range” and agency concluded that specifications were unclear).
- h. Eliminate appearance of unfair competitive advantage. P&C Constr., B-251793, 93-1 CPD ¶ 361 (Comp. Gen. Apr. 30, 1993).
- i. Failure to incorporate wage rate determination. IC&N Maint., Inc., B-253876, 93-2 CPD ¶ 253 (Comp. Gen. Nov. 1, 1993) (wage determination received after bid opening, but prior to award).
- j. Failure to set aside a procurement for small businesses or small disadvantaged businesses when required. Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc., B-256192.3, 95-1 CPD ¶ 75 (Comp. Gen. Sept. 2, 1994); Ryon, Inc., B-256752.2, 94-2 CPD ¶ 163 (Comp. Gen. Oct. 27, 1994).
- k. Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the “awardable range” and agency concluded that specifications were unclear); Site Support Services, Inc., B-270229, 96-1 CPD ¶ 74 (Comp. Gen. Feb. 13, 1996) (cancellation proper where IFB contained incorrect government estimate of services needed); Canadian

Commercial Corp./ Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (no compelling reason to cancel simply because some terms of IFB are somehow deficient when solicitation read as a whole only has one reasonable interpretation); US Rentals, B-238090, 90-1 CPD ¶ 367 (Comp. Gen. Apr. 5, 1990) (contracting officer cannot deliberately let bid acceptance period expire as a vehicle for cancellation); C-Cubed Corporation, B-289867, 2002 CPD ¶ 72 (Comp. Gen. Apr. 26, 2002) (agency may cancel a solicitation after bid opening if the IFB fails to reflect the agency's needs).

4. Before canceling the IFB, the contracting officer must consider any prejudice to bidders. If cancellation will affect bidders' competitive standing, such prejudicial effect on competition may offset the compelling reason for cancellation. Canadian Commercial Corp./ Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202.
5. If an agency relies on an improper basis to cancel a solicitation, the cancellation may be upheld if another proper basis for the cancellation exists. Shields Enters. v. United States, 28 Fed. Cl. 615 (1993).
6. Cancellation of the IFB may be post-award. Control Corp., B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993).

VIII. AWARD OF THE CONTRACT.

- A. Statutory standard. The contracting officer shall award with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 3701, *et seq*; FAR 14.408-1.
- B. Communication of acceptance of the offer and award of the contract. The contracting officer makes award by giving written notice within the specified time for acceptance. FAR 14.408-1(a).
- C. Multiple awards. If the IFB does not prohibit partial bids, the government must make multiple awards when they will result in the lowest cost to the government. FAR 52.214-22; WeatherExperts, Inc., B-255103, 94-1 CPD ¶ 93 (Comp. Gen. Feb. 9, 1994) (required to make multiple awards, rather than an aggregate award, under an IFB for services which contains four separate items, each covering a separate location, where the IFB permitted bids on single locations and did not require an aggregate award, and where multiple awards will result in a lower price than an aggregate award).

- D. An agency may not award a contract to an entity other than that which submitted a bid. Gravely & Rodriguez, B-256506, 94-1 CPD ¶ 234 (Comp. Gen. Mar. 28, 1994) (sole proprietorship submitted bid, partnership sought award).
- E. The “mail box” rule applies to award of federal contracts. Award is effective upon mailing (or otherwise furnishing the award document) to the successful offeror. FAR 14.408-1(c)(1). Singleton Contracting Corp., IBCA 1770-1-84, 86-2 BCA ¶ 18,800 (notice of award and request to withdraw bid mailed on same day; award upheld); Kleen-Rite Corp., B-190160, 78-2 CPD ¶ 2, (Comp. Gen. July 3, 1978).

IX. CONCLUSION